STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	10-0138
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	:	
Proposal to implement a Purchase of Receivables with Consolidated Billing (PORCB) Service	:	
	:	
(Tariffs filed January 20, 2010).	:	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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September 14, 2010

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Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission's ("Commission" or "ICC") Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the instant proceeding.

I. BACKGROUND

On January 20, 2010, Commonwealth Edison Company (the "Company" or "ComEd") filed with the Illinois Commerce Commission ("Commission" or "ICC") revised tariffs in order to implement a purchase of receivables ("POR") with consolidated billing ("CB") service ("PORCB Program") for the benefit of retail customers and retail electric suppliers ("RES"), pursuant to Section 16-118 of the Illinois Public Utilities Act (the "Act"), "Services provided by electric utilities to alternative retail electric suppliers," 220 ILCS 5/16-118. On February 24, 2010, the Commission entered Suspension Orders

commencing the investigation concerning the propriety of ComEd's proposal to implement a PORCB service and on June 2, 2010 entered a Resuspension Order extending the suspension through December 18, 2010. In due course, the Administrative Law Judge assigned to this proceeding established a schedule for the submission of pre-filed testimony, hearings, and briefs (Tr., March 24, 2010, p. 9).

In response to the Company's filings, the following parties filed Petitions to Intervene, which were granted: the Citizens Utility Board ("CUB"), BlueStar Energy Services, Inc. ("BlueStar"), National Energy Marketers Association ("NEMA"), Illinois Competitive Energy Association ("ICEA"), Retail Energy Supply Association ("RESA"), Dominion Retail, Inc. ("Dominion"), and Illinois Energy Marketers Coalition ("ILEMC").

At the August 19, 2010 evidentiary hearing in this matter, Torsten Clausen, Director of the Office of Retail Market Development ("ORMD"), answered questions from the ALJ on behalf of Staff.

On September 2, 2010, the parties and Staff filed Initial Briefs ("IBs") in this matter. Staff's IB identified and responded to many if not most of the arguments raised in the parties' IBs. In this Reply Brief, Staff has incorporated many of those responses by reference or citation to Staff's IB. However, in the interest of brevity, Staff has not raised and repeated every argument and response previously addressed in Staff's IB. Thus, the omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in Staff's IB because further or additional comment is neither needed nor warranted. As explained in detail below and in Staff's IB, the arguments raised by certain parties lack merit and must be rejected.

II. ARGUMENT

A. ComEd's Proposed $0.50 Fixed Per-Bill Charge

While most of the arguments presented in the parties' IBs have been addressed in Staff's testimony, Staff nevertheless responds to some of the statements made by the parties, especially the comments from ComEd and ICEA.

Both ComEd and ICEA argue that the fact that the Commission approved a percentage-based cost recovery charge when it approved the AIU's tariffs implementing the same statutory requirements is not relevant in this case. (ComEd IB, at 15-16; ICEA IB, at 12-13.) ComEd states that "it is without question that the Commission has the authority to consider and adopt an alternative proposal that is broadly supported by those for whom the program is designed." (ComEd IB, at 15.) Staff does not disagree with the notion that the Commission is not "locked-in" to a decision it has made before. However, Staff recommends that the Commission articulate a compelling reason to arrive at a different conclusion for the same issue, especially when its prior decision was issued so recently. Staff contends that no compelling reason has been presented by ComEd and its supporters in this case.

Without rehashing Staff's response to every reason brought forward in support of the proposed $0.50 fixed per-bill charge, Staff would like to focus on the "reason" most prominently featured in ComEd's series of arguments. ComEd's central argument is that Staff's proposed percentage-based charge is discriminatory because the charge bears no relationship to the nature of the costs incurred for the service provided.

(ComEd Ex. 6.0, at 7) However, as pointed out by Staff numerous times (summarized in Staff IB, at 10-14), ComEd did not show, or even claim, that its proposed per-bill charge bears a relationship to the nature of the costs incurred for the service provided. In fact, in its IB, ComEd appears to soften its earlier argument that the $0.50 charge follows traditional ratemaking principles when it states that its proposal is "*more* consistent with traditional ratemaking principles." (ComEd IB, at 16, emphasis added) In Staff's view, this is not a compelling reason for the Commission to abandon the percentage-based charge approved for the AIU tariffs. In addition, Staff continues to be surprised that the previously Commission approved percentage charge is all of a sudden so fundamentally at odds with traditional ratemaking principles.

ICEA attempts to address the departure from a percentage-based charge by stating that the Commission should not "attach any broad or persuasive policy significance or weight" to the Commission's earlier decision to approve a percentage-based charge because the AIU's overall discount rate "was the subject of a broader Memorandum of Understanding agreed to by ICEA and other suppliers." (ICEA IB, at 12-13) Staff finds this reasoning rather counter-productive to ICEA, because why would the Commission now attach "any broad or persuasive policy significance or weight" to the Memorandum of Understanding agreed to by ICEA and other suppliers in *this* Docket?

ICEA also states that the "robust debate over cost-recovery methodologies between Staff and ComEd in this proceeding did not occur in the Ameren proceeding" and that Staff never asserted "in the Ameren proceeding that it was 'more reasonable' and 'appropriate' for suppliers serving commercial customers to pay more of the

implementation costs than suppliers focused on serving residential customers." (ICEA IB, at 12.) However, Staff thinks there is a simple explanation why such a debate did not occur in that proceeding. First, it never occurred to Staff that anything other than a percentage-based charge built into the discount rate would be a superior manner to recover the implementation costs from participating suppliers. Second, Staff did not have to defend the percentage-based charge because neither the AIU, ICEA, RESA, other suppliers, the AG, or CUB presented arguments that a percentage-based charge bears no relationship to the costs incurred, and that it would not be following traditional rate making principles. (For a more expansive response to a similar argument made by ComEd, see Staff IB at 15-16.)

When discussing Staff's concerns regarding a fixed per-bill charge for low-usage customers, ICEA states that "even Staff apparently concedes" that mass market suppliers serve a variety of customers of varying usage levels. (ICEA IB, at 12.) ICEA bases this Staff "concession" on Staff's own reference to the recent competitive activity in Pennsylvania's Power and Light's residential market. (*Id*.) However, ICEA's argument misses the point. Staff is concerned about the consequences of imposing a fixed per-bill charge, and ICEA does not point to the existence of any fixed per-bill charge for suppliers serving those residential customers in Pennsylvania.

ICEA claims that "Staff appears to have lost interest in following the intent of the General Assembly to develop a viable POR-UCB offering for non-residential customers." (ICEA IB, at 7.) ICEA does not provide any reference to Staff's testimony that led it to make such a broad and negative statement. As a result, Staff is unable to respond to this particular charge.

ICEA also states that "the residential market is not the only market which can benefit from these market development tools and the General Assembly clearly directed that POR and UCB be offered for use beyond residential customers." (ICEA IB, at 6.) Staff agrees with this statement and has expressed this in testimony. (Staff Ex. 5.0, at 11-12.) However, ICEA also states in its IB that "[a] discount rate that includes a cost recovery component that is significantly higher than 54 cents would likely discourage the use of ComEd's PORCB service." (ICEA IB, at 8.) ICEA then jumps to the conclusion that Staff's proposed cost recovery mechanism "effectively limits the availability of POR/UCB to only those customer classes who currently are not being offered competitive supply options." (*Id.*, at 8-9.) In other words, ICEA has equated its assertion that a higher cost recovery charge "likely discourages" the use of PORCB with "effectively limiting" the use of PORCB. Even if the Commission were to agree with ICEA's assertion that Staff's proposed percentage-charge "likely discourages" the use of PORCB for non-residential customers, Staff does not agree that it amounts to "effectively limiting" the use of PORCB. ICEA's unfounded jump in logic might also explain why it made the unsupported statement that Staff apparently has "lost interest in following the intent of the General Assembly to develop a viable POR-UCB offering for non-residential customers." (*Id.*, at 7.)

ICEA states that "[d]espite Staff's assertion that there are 'numerous suppliers' serving commercial customers, there are a number of small and medium commercial customers who have not yet switched to competitive supply." (ICEA IB, at 9.) Staff is surprised at the choice of the word "assertion" when it comes to describing suppliers currently serving non-residential customers. ICEA makes it sound as if that information

were not publicly available, which, of course, it is. According to the ORMD's annual report pursuant to Section 20-110 of the Act, there were 22 suppliers serving commercial customers in the ComEd territory, and 12 suppliers were serving commercial customers in the AIU's territories as of December 2009.[1] In addition, the number of medium commercial customers still on ComEd's fixed price supply service cited by ICEA is no longer anywhere near 5,323 because as of June 2010, most customers are no longer entitled to take fixed price bundled service from ComEd, pursuant to Section 16-113(b). (ICEA IB, at 9.)

Both ComEd and ICEA repeatedly mention the fact that several parties, including two supplier associations, support the proposed $0.50 fixed per-bill fee. For example, ComEd notes that "RESA and ICEA, representing some 15 RESs, have maintained support for the proposed rate structure" and that by "[i]gnoring the months of negotiations" ComEd and others have engaged in, "Staff and Dominion propose that this cooperation and agreement be rejected." (ComEd IB, at 15.) ComEd makes it sound as if the parties not part of the negotiations, Staff and Dominion, should just accept the result of negotiations because not agreeing with the outcome evidently "ignores" the negotiations altogether. Staff is unable to follow this logic.

Furthermore, Staff has no reason to believe that these were anything other than honest negotiations, done in good faith by all parties. This does not mean, however, that the proposed $0.50 fixed per-bill charge is the only possible cost recovery charge that allows broad supplier participation in the PORCB program. Referring to ComEd's $0.54 Rider SBO credit, ICEA claims that "[a] discount rate that includes a cost recovery component that is significantly higher than 54 cents would likely discourage the use of

[1] http://www.icc.illinois.gov/downloads/public/2010ORMDSection20110report.pdf

ComEd's PORCB service." (ICEA IB, at 8.) Accordingly, $0.50 was apparently not the maximum fixed per-bill charge ICEA would have agreed to pay. Instead, ICEA seems to imply that a fee of $0.54 is not likely to discourage the use of PORCB. Not only that, ICEA seems to state that fees not "significantly" higher than $0.54 are not likely to discourage the use of PORCB, either. ICEA does not state what it considers to be acceptable; apparently an amount somewhere above $0.54 and below "significantly higher than $0.54."

Tied to this particular discussion is ComEd's notion that Staff's proposal intends to "unjustly and unabashedly extract more revenue from RESs serving high use customers." (ComEd Ex. 6.0, at 6.) Apparently ComEd is trying to portray Staff's percentage-based proposal as something immoral because it takes into account some sense of "affordability" on the part of the RES. Yet, is it not reasonable to assume that this sense of "affordability" is exactly what entered the negotiations between ComEd and the suppliers? If affordability by the RESs was not a factor, why stop at $0.50? Why not $0.80? Why not $5? To use ICEA's own words, "ICEA would not have agreed to the MOU, had its members thought it would result in an unused, unworkable and unwanted POR and UCB service." (ICEA IB, at 11.)

The question then becomes why the suppliers agreed to a per-bill charge of $0.50 and not a higher one. Staff has no reason to doubt ICEA's assertion that several of its members are contemplating serving residential customers. (ICEA IB, at 4-6.) Therefore, it is not unreasonable to assume that the maximum charge was primarily driven by a desire to keep a per-bill charge low enough that allows suppliers to serve residential customers as well. In other words, Staff finds it reasonable to assume that

suppliers wanting to exclusively serve customers in the 0-100 kW and 100-400 kW commercial customer classes would have agreed to a per-bill charge that is higher than $0.50. However, the problem with setting a fixed per-bill charge that does not take into account the amount of receivables, is that it results in a per-bill charge that does not take advantage of the higher "affordability" associated with suppliers serving high-use commercial customers. Given the fact that Dominion shares Staff's concern about the "affordability" of the $0.50 even for the residential class might indicate that most suppliers supporting the $0.50 charge are planning to use PORCB for high-use commercial customers as well as residential customers. The Commission has the ability to set the cost recovery charge based on a percentage of the receivables sold to the utility and thereby avoiding setting a charge that is too low for some suppliers and too high for other suppliers.

Dominion raises an interesting argument regarding the resulting range of possible discount rates in the event the Commission adopts ComEd's proposed $0.50 per-bill charge. Dominion argues that the "lack of a specific discount rate is in conflict with the Public Utilities Act." (Dominion IB, at 16.) Dominion cites to 16-118(c) of the Act which requires "a just and reasonable discount rate to be reviewed and approved by the Commission." (220 ILCS 5/16-118(c).) While this argument does indeed possess some appeal, Staff is unable to wholeheartedly support the notion that this particular statutory provision prevents the Commission from adopting ComEd's proposed fixed $0.50 per-bill charge.

However, the same statute requires that "the discounted rate for purchase of receivables shall be included in the tariff filed pursuant to this subsection (c)." (220

ILCS 5/16-118(c).) ComEd's proposed tariffs include the formula for calculating the discounted receivables and because of the use of the fixed $0.50 per-bill charge, the tariffs will not contain the actual "discounted rate for purchase of receivables." In fact, the tariff could not contain the discounted rate for purchase of receivables because, under ComEd's proposal, the discounted rate for purchase of receivables is not known in advance and the discount rate changes with the amount of receivables to be purchased. Staff thinks a strong argument can be made that this result does in fact conflict with the statutory mandate found in Section 16-118 (c) of the Act.

Staff noted in its IB that RESA had stated in rebuttal testimony that it is "amenable" to a percentage-based charge for residential customers. (Staff IB, at 27, *citing to* RESA Ex. 1.0, at 15.) However, in its Initial Brief, RESA makes no reference to that statement from its rebuttal testimony. RESA's IB only mentions the rebuttal testimony by stating that RESA "is a party to the Memorandum of Understanding which calls for the application of a fifty-cent per bill fee to all customers" and that RESA "supports the Memorandum of Understanding." (RESA IB, at 15.) As a result, Staff can only assume that RESA is no longer "amenable" to a percentage-based charge for residential customers.

B. Switching Rules Revisions

In its IB, ComEd claims that it is a "fact that utilities are not legally obligated to provide bill inserts under Section 16-118(c) as a tariffed service (220 ILCS 5/16-118(c)), and Section 16-103(e) would prohibit compelling utilities to offer billing inserts under tariffed rates (220 ILCS 5/16-103(e))." (ComEd IB, at 41.) Staff indicated that it does not wish to force the Commission to make a decision on this issue in this proceeding

because "Staff does not want to see further delay in the implementation of Rider PORCB." (Staff IB, at 39.) As a result, Staff will not respond to ComEd's legal arguments regarding this issue and Staff recommends that the Commission not reach any conclusions on the merits or requirements of utilities providing bill inserts for RES customers under PORCB.

C. Bill Inserts

In its IB, ComEd claims that it is a "fact that utilities are not legally obligated to provide bill inserts under Section 16-118(c) as a tariffed service (220 ILCS 5/16-118(c)), and Section 16-103(e) would prohibit compelling utilities to offer billing inserts under tariffed rates (220 ILCS 5/16-103(e))." (ComEd IB, at 41.) Staff indicated that it does not wish to force the Commission to make a decision on this issue in this proceeding because "Staff does not want to see further delay in the implementation of Rider PORCB." (Staff IB, at 39.) As a result, Staff will not respond to ComEd's legal arguments regarding this issue and Staff recommends that the Commission not reach any conclusions on the merits or requirements of utilities providing bill inserts for RES customers under PORCB.

D. Cut-Off Date for the Incurrence of Implementation Costs

ComEd spends three pages of its IB summarizing Mr. Mittelbrun's rebuttal testimony on the issue of Staff's proposed December 31, 2011 cut-off date for the incurrence of implementation costs. (ComEd IB, at 21-23.) ComEd does not spend a single word acknowledging, much less rebutting, Staff's response to Mr. Mittelbrun's rebuttal testimony. As explained in detail in Staff's IB, none of the arguments presented by ComEd in support of its opposition to the proposed cut-off date for implementation

costs, or any cut-off date, are convincing. (Staff IB, at 44-48.) While ComEd briefly acknowledged Staff's response in Mr. Garcia's surrebuttal testimony, no attempt was made to rebut any of Staff's reasoning. (ComEd Ex. 6.0, at 13-14.)

In its argument against Staff's proposal to limit recovery of billing system modification costs incurred through December 31, 2011, the Company provides discussion of the modifications that would need to be made presumably beyond that date.[2] However, that discussion fails to show what costs will continue to occur more than a year after the program goes "live" in December 2010. While Staff does not disagree that fixes to software bugs and general post-production support will continue beyond the December 2011 cut-off date, Staff believes those types of costs would be more in the nature of ongoing operating expenses rather than capitalized costs. Staff's proposal is based on the same proposal that was approved in the Ameren UCB/POR proceeding, Docket No. 08-0619, and is not "unsupported and arbitrary"[3] as the Company claims.

Finally, regarding Staff's proposed cut off date for capital costs, the Company asserts that "Any IT-related work would not commence until cost recovery was fully addressed."[4] This threat should be dismissed. ComEd has been incurring IT-related PORCB costs since 2008. Cost recovery will not be fully addressed until the reconciliation proceeding after the end of the first application period, over two years from now.

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2 ComEd IB, pp. 22-23.
3 *Id*.
4 *Id*.

E. Disputed Charges

ComEd argues in its IB that the dispute resolution process for RES charges appearing on ComEd's bills is currently pending in ICC Docket 09-0592 and ComEd will update its Handbooks at the conclusion of that rulemaking proceeding. (ComEd IB, p. 40.) As Staff stated in Direct Testimony, there are two separate issues relating to disputed charges under Rider PORCB, only one of which is a subject of the Part 412 rulemaking process contained in ICC Docket 09-0592. (Staff Ex. 2.0, p. 4.) While the consumer protection aspect of the dispute resolution process is addressed in Part 412, Part 412 does not address how a utility must define a disputed charge for purposes of payment to the RES. In addition, Staff would like to point out that ComEd is vehemently opposed to waiting for final resolution of other issues in the Part 412 rulemaking and instead wants the Commission to approve its new switching rules as part of this Order. (ComEd IB, p. 35-39.) Yet, when it comes to the dispute resolution process, ComEd seems perfectly fine with leaving it to the rulemaking proceeding in Docket No. 09-0592. Staff strongly recommends that ComEd's tariff implementing a purchase of receivables program should clearly define a "legitimate billing dispute" as it determines when ComEd will and will not pay the RES for its receivables. (Staff Ex. 2.0, p. 4.)

Additionally, ComEd maintains in its IB that the level of detail Staff is proposing in its definition of "legitimate billing dispute" is not appropriate for the tariff and should instead be set forth in the RES and Customer Handbooks which allow for the revision of operational rules as and when appropriate after discussion with impacted parties. (ComEd IP, p. 40) As Staff stated in its IB, Staff's proposed definition is taken directly from the definition of "disputed charges" approved in Ameren's UCB/POR tariffs which

includes even more operational detail than Staff is proposing for ComEd's tariff. Staff stated in the AIU tariff investigation that it "is committed to developing a consistent dispute resolution process that would apply to all electric utilities offering UCB/POR."[5] Additionally, none of the parties participating in this case have taken a stand on this issue. Therefore, it seems that the requirements for ComEd to accept notification of a legitimate billing dispute from the ICC's CSD and refer a customer to the RES are not particularly problematic to impacted parties participating in this case. For these reasons, Staff recommends the adoption of its proposed definition of "legitimate billing dispute," as noted below.

> **Legitimate Billing Dispute**
>
> A dispute shall not be considered a legitimate billing dispute until such time the Company has received notice of the billing dispute from the RES or the Consumer Services Division (CSD) of the ICC. If a customer contacts the Company to dispute a RES charge, the Company will refer the customer to the RES for resolution as well as provide contact information for the ICC's CSD.

See Staff IB, at 49.

F. Tariff Language Changes Proposed for Rate RDS

ComEd argues in its IB that Staff's proposed revisions to Rate RDS are not appropriate because Staff identifies an applicant for electric service as a "new customer" which is not technically correct. (ComEd IB, p. 40.) In Rebuttal Testimony, Staff recommended modifying its language as proposed in direct testimony by striking "is" and adding "would be" to state "such applicant would be a new customer" so that the language is technically correct. (Staff Ex, 6.0, p. 2.) However, ComEd never responded to that modification proposed by Staff.

[5] ICC Docket Nos. 08-0619/0620/0621 (Cons.) Staff Exhibit 9.0-REV, lines 224-226.

As Staff stated in its IB, Staff's recommended changes were intended to clarify that applicants for *new* residential service are not eligible to take Rate RDS, and therefore not eligible to sign up for supply service with a RES. Applicants for new residential service must first establish service with ComEd under a tariff for bundled service before becoming eligible to switch their supply service to a RES. The fact that applicants for new service are not eligible to sign up with a RES when initiating new service is a significant provision of ComEd's Rate RDS that those less familiar with ComEd's ratebook, such as RES and CSD staff assisting customers, should be able to clearly understand without referring to multiple pages of ComEd's ratebook, Illinois law or the Illinois Administrative Code. (Staff IB, p. 51-52.) For these reasons, Staff recommends adoption of its modified language for ComEd's rate RDS below:

> However, this tariff is not available to an applicant for electric service at a premises in the event that such applicant ~~is~~ would be a new customer having ~~has~~ never received any tariffed service from the Company and has expected electric power and energy requirements such that, in the Company's judgment, the applicant would be a retail customer that is a (a) residential retail customer, (b) lighting retail customer that has established or is expected to establish 30-minute demands for electric power and energy that do not exceed 100 kW, or (c) nonresidential retail customer to which the Watt-Hour Delivery Class or Small Load Delivery Class is applicable. This tariff is available to applicants for new service ~~such applicant~~ only after such applicant takes service as a retail customer under a tariff for bundled electric service.

G. Recoverable Cost Estimate

ComEd, throughout its IB, criticizes Staff for questioning costs proposed for recovery through Rider PORCB. This criticism ignores the fact that despite Staff's repeated attempts to obtain support for its costs estimates, nothing was provided to Staff from ComEd to support the costs proposed for recovery through Rider PORCB.

ComEd claims that its costs were "prudently incurred"[6] and that Dominion "does not (and cannot) point to a penny of ComEd's cost estimates as unreasonable or imprudently incurred."[7] Neither Dominion, Staff, nor any other party could point to costs that were unreasonable or imprudently incurred since the Company did not provide any support for its costs estimates as requested by Staff.[8]

The majority of the costs of the PORCB program are the billing system costs that ComEd estimates to be $17.6 million.[9] ComEd's "go-live" date was originally set for December 1, 2010 at which time it would be reasonable to assume that the billing system would be in place.[10] However, as discussed in Staff's IB, no third party support was provided for either the costs incurred to date, or the estimated amounts.[11]

ComEd mischaracterizes Staff's proposal as prematurely disallowing costs before ComEd "has the opportunity to show costs were prudently incurred and reasonable in amount."[12] How can the costs be prudently incurred as claimed on page 3 of the IB, when there has been no showing of prudency? Staff's position is not that costs should be disallowed; rather, Staff's position is that the Company bears the burden of supporting the rates it anticipates to charge as soon as April 2011. Staff is only attempting to gain an understanding of the costs estimates as originally filed as well as the 40% increase in costs currently contemplated for recovery in rates beginning

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6 ComEd IB, p. 3.
7 *Id*., p. 19.
8 Staff IB, pp. 60-63.
9 ComEd Ex. 4.0, p. 2 at 39 – 40.
10 While the Company has revised the "go-live" date to a date no later than April 1, 2011, the reason for the delay anticipates changes to the switching rules as discussed in ComEd IB, pp. 38-39.
11 Staff IB pp. 60-63.
12 ComEd IB, p. 21.

in April 2011.[13] ComEd jumps to the conclusion that because Staff requested support for the estimated costs, Staff was violating ComEd's statutory right to an opportunity to recover those costs.[14]

ComEd claims that "the appropriate forum for investigating such allocations is ComEd's recently filed rate case pending in ICC Docket No. 10-0467."[15] Staff disagrees. The proper forum to support rates to be charged under Rider PORCB should be done in this case not through a separate docket that will establish base delivery rates. The Company needed to have been forthcoming with the allocation details in the current case to enable a determination to be made currently of the appropriate level of costs to be recovered under Rider PORCB.

On the one hand, ComEd claims that when the PORCB recovery mechanism is approved by the Commission in this case, ComEd will remove those costs from the rate case revenue requirement in Docket No. 10-0467.[16] However, this is not possible as the schedule for a final order to be entered in this case is December 2010, while the drop dead date for the rate case is not until May 26, 2011. The Company claims that "If costs are determined to be more appropriately recoverable in base distribution rates, appropriate adjustments will be made to remove them from Rider PORCB."[17] Thus, the final determination will not occur until the second month that rates will be charged under Rider PORCB. ComEd's proposal to delay the review of the PORCB costs until the review in the rate case only gives ComEd a second bite at the apple. The support should have already been provided for as consideration of the basis for the estimates in

13 Staff IB, pp. 62-63.
14 ComEd IB, p. 21.
15 *Id.*, p. 4.
16 *Id*.
17 *Id*., pp. 28 – 29.

this case.

H. Challenge to Deferred Costs

Staff's questioning of the deferred costs was not one of preapproval for recovery under the new legislation.[18] Rather, Staff questioned whether the Company had requested and received approval to defer costs as a variance from accounting rules consistent with the treatment for deferred environmental remediation costs.[19] Staff understands that the costs incurred from the date the statue took effect would be capitalized costs as part of the billing system modification project and would not be operating expenses.[20] The general discussion provided in Company surrebuttal testimony only further added to Staff's concern about the overall costs proposed for recovery.

I. Calculation of Costs

ComEd argues a conflict exists between Staff witness Ebrey's concern with the lack of supported costs estimates and Staff witness Phipps' proposal for a lower return on equity. Specifically, ComEd claims:

> Ms. Phipps completely ignores and fails to take into account the material risks introduced by her colleague, Ms.Ebrey, and the future *ex post* prudence review. Even the most cursory review of Ms. Ebrey's testimony shows that her proposals introduce substantial risk and, if adopted, would leave ComEd with something far less than "dollar for dollar cost recovery.
>
> ComEd IB, p. 29.

The Commission should reject the Company's mischaracterization of Staff's testimony because Ms. Ebrey opposes the Company's ill-defined cost categories,

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18 ComEd IB, p. 26.
19 Staff IB, pp. 57-58.
20 *Id*., pp. 55-57.

including "deferred expenses;" however, Ms. Ebrey does not recommend the Commission deny the Company recovery of any costs related to the PORCB program. (Staff IB, at 62-63.) Further, as seen above, ComEd defines the prudence review as an "*ex post*" review. However, both the Commission and the Illinois Appellate Courts have specifically rejected the idea of *ex post* prudent reviews and instead have defined prudence as:

> Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management *at the time decisions* had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. *Hindsight review is impermissible.*

Illinois Commerce Comm'n v. Commonwealth Edison Co., Ill. C.C. Docket No. 84-0395 (Oct. 7, 1987), p. 17) (emphasis added). (*See also Illinois Power Co. v. Illinois Commerce Comm'n*, 245 Ill. App. 3d 367, 371 (3rd Dist. 1993); *see also Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill. App. 3d 425, 428 (3rd Dist. 1993) ("When a court considers whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.")).

Moreover, the Company claims surprise that Staff would challenge costs in proceedings in which the recoverable costs are considered. (ComEd IB, p. 31.) The Company specifically accepted Staff's proposal to include express acknowledgement that the Commission would allow only prudently incurred costs to be recovered under the Rider.[21] ComEd's apparent surprise that Staff would challenge costs as imprudent is disingenuous. The burden of proof that costs are appropriate for recovery is always

[21] ComEd Ex. 3.0, p. 24, lines 600 – 604.

on the Company. Approval of the recovery mechanism does not give any indication of approval of the level of costs included in the rates charged.

J. Rate of Return

Staff proposes 6.61% rate of return on common equity for unrecovered PORCB costs (the "PORCB assets"), which equals the midpoint of the ten-year yield on AAA-rated utility debt and the Company's rate of return on rate base to reflect a ten-year maturity instead of a perpetuity. (Staff IB, p. 67.)

ComEd opposes Staff's recommendation and argues:

> Nevertheless, in this fictional world of no-risk, Ms. Phipps patches together a calculation of an absurdly low return on equity based on three flawed assumptions – (i) that the PORCB statute is analogous to the transitional funding law; (ii) that the investing community will ascribe an absence of risk, or even lower risk, to assets subject to an adjustment clause, and (iii) that ComEd finances projects individually.

ComEd IB, pp. 29-30.[22]

Staff addressed each item that ComEd labels a "flawed assumption" in its IB. (Staff IB, pp. 66-83)

PORCB assets are closer in risk to transition bonds than rate base assets. (Staff IB, pp. 70-79.) Even though PORCB costs are subject to the same prudence review that other utility costs are subject to during traditional rate proceedings, PORCB assets are less risky than rate base assets due to periodic reconciliation and true up proceedings, which effectively guarantee that ComEd will recover 100% of prudently incurred costs associated with the PORCB program. No similar adjustment mechanism,

[22] ComEd's needlessly inflammatory language appears designed to raise questions regarding Ms. Phipps' credibility. However, it should be noted that Staff witnesses like Ms. Phipps are obligated to both ensure financially healthy public utilities in Illinois while also ensuring just and reasonable rates for consumers. (*See generally* 220 ILCS 5/1-101.) In contrast, Staff has endeavored to provide the Commission a dispassionate review and analysis of the facts in this case. (*See also* Tr. (Aug. 19, 2010), at 86-88.)

or guarantee, exists in traditional ratemaking to ensure a utility will earn its authorized rate of return on rate base.[23] (Staff IB, pp. 70-71.)

ComEd argues that Article 18 of the Act ("Funding Law") is distinguishable from the statute authorizing the PORCB program (Section 16-118 of the Act) because certain non-risk features of the Funding Law, which are critical to AAA bond ratings, are not present in Section 16-118 of the Act. ComEd argues further that dismissing those non-risk provisions required for AAA bond ratings as irrelevant indicates a lack of understanding of the structure of the transition bonds and the importance of such structure to investors. (ComEd IB, pp. 31-32.) Staff explained the inaccuracies in ComEd's argument: (1) the riskiness of the PORCB assets are similar to transition bonds (excepting prudence risk, which Staff accounted for by adding a premium to the AAA bond yield); and (2) legal barriers created under the Funding Law did not change the riskiness of a utility's assets. (Staff IB, pp. 70-79.) Rather, the legal barriers segregated the low risk Funding Law assets (*i.e.*, Intangible Transition Property, or "ITP") from ComEd's other utility assets. This legal separation made it possible for the Trust to whom ComEd sold the ITP to issue debt that reflected the risk of the ITP only. If ComEd had retained ownership of the ITP, the risk of the ITP would have been the same. However, the securities that ComEd issued would have reflected a weighted-average of the low risk ITP and its other utility assets. The rate of return on ComEd's securities, reflecting that weighted-average of ITP and other utility assets, would have equaled the weighted average rate of return of the Trust's AAA-rated securities and ComEd's cost of capital. (See Tables in Staff IB, pp. 77-78.)

Consider a situation in which only legal barriers between the Trust and ComEd

[23] As a matter of law, imprudently incurred costs are by definition excluded from rate base.

existed but the ITP cost recovery was the same as that for ComEd's utility investment (*e.g.*, did not include the true-up mechanism and remained subject to prudence and reasonable cost reviews). Would the Trust's transition bonds have received a AAA rating or would its cost of common equity have been similar to ComEd's investment in rate base? To answer this question one need only look at the examples like this that exist throughout the country in the form of other regulated utility companies that are not affiliated interests of ComEd. One example would be the current Commission-authorized rate of return on equity for ComEd, which was based on nine (9) electric and gas utilities that were not affiliated with ComEd, meaning the Commission found those non-affiliated companies to be similar in risk to ComEd. (Order, Docket No. 07-0566, September 10, 2008, pp. 80-82 and 99.)

Regarding another non-risk feature of transition bonds, ComEd contends, "[t]he segregation of funds assures investors that funds flowing from the transition charge will not be commingled with, and therefore potentially misappropriated by, the utility." (ComEd IB, p. 32.) However, even though the segregation of the funds was an important feature of securitization, it is inapplicable with respect to PORCB assets. The Trust that issued the transition bonds against the ITP relied upon ComEd to collect the transitional funding instrument charges from its customers and remit those charges to the Trust. This arrangement created the potential for risk because "a failure or inability of the Servicer [ComEd] to remit the full amount of the estimated IFC Payments [charges to recover the ITP] on any Monthly Remittance Date, whether voluntary or involuntary, might result in delays in payments to Noteholders. Such retention of funds [by ComEd] could also have adverse consequences to Noteholders in the event of a

bankruptcy of the Servicer [ComEd]." (Staff Cross Exhibit 1, p. 39.) To mitigate that risk, ComEd was required to segregate IFC Payments if it failed to meet certain conditions, including maintaining top tier short-term credit ratings. (Staff Cross Exhibit 1, p. 46.) In contrast, no Servicer-related risks exist for PORCB charges since no intermediary will stand between ComEd and customer remittances of PORCB charges. Therefore, the segregation of funds is unnecessary, and the Company's argument should be rejected.

Second, the Company asserts that an underlying assumption of Ms. Phipps' recommendation is "that the investing community will ascribe an absence of risk, or even lower risk, to assets subject to an adjustment clause," which the Company argues is a flawed premise. (ComEd IB, pp. 29-30.) The Company is wrong. Standard & Poor's confirms that the adjustment clause, also referred to as a "reconciliation" or "true-up," effectively eliminates credit risk. (Staff IB, p. 76.)

The Company alleges:

> In order to invoke the Funding Law, Ms. Phipps had to downplay the prudence risk. In addition to her erroneous claims that ComEd will receive "dollar for dollar cost recovery", she also claims that "there is virtually no risk that ComEd will recover less than 100% of the prudent costs it incurs to implement the PORCB program". These statements leave the false impression that ComEd is at no risk whatsoever of having costs disallowed.

ComEd IB, pp. 32-33.

To the contrary, Ms. Phipps identified prudence risk as a significant difference between transition bonds and PORCB assets, and she added 238 basis points to the ten-year, AAA-rated utility bond yield to account for that additional risk factor (*i.e.*, 238 basis points + 4.23% = 6.61%). She also explained that if PORCB assets were not

exposed to prudence risk, then she would recommend a 4.23% rate of return on equity for PORCB assets instead of 6.61%. (Staff IB, p. 67.)

Furthermore, citing Staff Ex. 4.0, line 48, the Company describes Ms. Phipps' claim that ComEd will receive "dollar for dollar" cost recovery as erroneous.[24] Yet, Ms. Phipps' testimony at that citation merely quotes Company witness Garcia's testimony, which states, "[i]n essence, these two rider mechanisms, working in concert, will allocate and reallocate both costs and revenues between RESs and all customers with demands under 400 kilowatts, *while providing ComEd with nothing more than dollar-for-dollar cost recovery* in a somewhat timely, albeit protracted, manner." (ComEd Ex. 1.0, p. 10, emphasis added) Thus, ComEd has effectively argued that the testimony of its witness, Robert Garcia, is erroneous with regard to the function of the proposed riders.

Third, the Company repeatedly mischaracterizes Ms. Phipps' testimony when it alleges Staff assumed the Company could finance PORCB projects using AAA-rated securitized debt. Specifically the Company alleges:

> [Ms. Phipps] relies upon four "similarities" to transitional funding instruments in order to support her flawed assumption that the PORCB projects could be financed using AAA-rated securitized debt [.]
>
> ComEd IB, p. 30.

The Company states further:

> Ms. Phipps mistakenly proposes a return level that presupposes that ComEd can issue individual debt and equity securities to finance different investments and thus achieve returns commensurate with the risks of the individual assets being financed.
>
> ComEd IB, p. 34.

[24] Ms. Phipps' testimony is clear that the "dollar for dollar" characterization of the proposed cost recovery mechanisms in the rider applies to prudently incurred costs only. (Staff Ex. 4.0, pp. 6 and 8-9.) On the other hand, ComEd witness Garcia's testimony is unclear on whether he was referring to **all** PORCB costs or *only prudently incurred* PORCB costs.

The Company's allegations are wrong on two levels. First, Ms. Phipps did not recommend an AAA bond yield for the rate of return on unrecovered PORCB costs. Ms. Phipps' recommended rate of return on common equity is 238 basis points above the 10-year AAA bond yield. (Staff IB, p. 67.) Second, as explained previously, the risk of PORCB assets is independent from how the assets are financed. (*See* Staff IB, pp. 79-80.) While it is true, that ComEd cannot finance PORCB costs separately from its other utility costs; that point is irrelevant. As Ms. Phipps explained, ComEd's cost of capital is a function of the weighted-average riskiness of all the assets it holds, including assets whose costs will be recovered through base rates and those such as PORCB assets that would be recovered through a rider with a true-up mechanism. As the proportion of costs that are recovered through riders with true-up mechanisms increases, the cost of capital will decline. Therefore, the Commission should reject the Company's straw man argument that ComEd cannot issue AAA-rated bonds to finance the PORCB assets.

The Company contends:

> ComEd has already invested half of the cost related to PORCB without knowing what the resulting revenue recovery stream will be. ComEd has financed these investments in the same way it finances all of its capital investments – with a mixture of debt and equity consistent with the weighting allowed in the last rate case with the reasonable presumption that the returns would also be fair, timely and consistent.
>
> ComEd IB, p. 35.

The rate of return Staff recommends for Rider PORCB is fair. It meets the principles the country's Supreme Court set forth in the *Bluefield* case:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the

> public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.
>
> *Bluefield Water Works v. Public Service Commission*, 262 U.S. 679, 692-93 (1923).

In contrast, ComEd's proposal that customers compensate ComEd for risk that ComEd is not incurring is a clear violation of the standards set forth in the Bluefield case long ago.

The Company asserts further:

> Even though there are provisions that eventually "true up" ComEd's various costs under PORCB, the ICC still has to approve those costs. The Commission is ranked a "Below Average 2" by Regulatory Research Associates, the regulatory framework in Illinois is rated Ba by Moody's, and cost recovery provisions are rated Baa by Moody's. These assessments indicate that regulatory risk is fairly high in Illinois, and therefore, investors will be more cautious of investments in Illinois than they would be for a utility in a jurisdiction with a better ranking.
>
> ComEd IB, p. 33.

Yet, Company witness Abbott acknowledged that ComEd's current A- credit rating already reflects the regulatory environment in Illinois. (Tr., p. 85; ComEd Ex. 5.0, p. 7.) Staff's rate of return recommendation for PORCB assets was derived, in part, from the Company's time-horizon adjusted rate of return on rate base. (Staff IB, p. 67.) The Company's rate of return on rate base was derived from a sample of companies with credit ratings similar to ComEd's current credit rating. (Order, Docket No. 07-0566, September 10, 2008, pp. 80 and 99.) As such, to the extent it is relevant to investors, Staff's rate of return recommendation already reflects credit rating agencies' assessments of the regulatory risk facing ComEd. Therefore, the Commission should reject the Company's argument.

The Company's arguments also erroneously suggest the transition bonds were risk-free instruments. To the contrary, there were material risk factors that investors were warned to consider before investing in the transition bonds, including, for example, uncertainties associated with unusual asset type, legal challenges that could adversely affect noteholders and possible payment delays or losses as a result of amendment or repeal of amendatory act or breach of state pledge. (Staff Cross Exhibit 1, pp. 36-49.)

Finally, the Company asserts:

> Ms. Phipps' approach is inconsistent with the Commission's treatment of costs under ComEd's Rider AMP. That rider provides for cost recovery of installed assets at a return equivalent to the allowed return in the most recent rate case, which includes a return on equity of 10.3%.
>
> ComEd IB, pp. 34-35.

The Company asserts further:

> To the extent that the Commission deviates from prior established methods – such as the method applied to the AMP program – in establishing the allowed cost of capital for investments, and does not provide for a cost of capital that is consistent with the actual costs incurred by ComEd, undertaking incremental investments in the system may not be feasible, given the lack of understanding as to the resulting cash flows.
>
> ComEd IB, p. 35, note 14.

In response, Staff notes that ComEd's Rider AMP is a tariff associated with a pilot program and has no relevance with respect to costs recovered via Rider PORCB and Rider RCA. In the Commission's Order approving Rider AMP, the Commission does not reach any conclusion regarding the appropriate rate of return for Rider AMP. Moreover, the Order states:

> [A]ny approval of Rider recovery herein is not to be construed as precedent for a utility's request for Rider recovery in the future; however, any conclusion drawn herein regarding the factual and legal issues may serve as precedent to the extent that such conclusions conform with

Illinois common-law regarding precedent.

See Order, Docket No. 09-0263, October 14, 2009, p. 58.

In contrast, the Commission expressly authorized a lower rate of return for The Peoples Gas Light and Coke Company's Infrastructure Cost Recovery Rider ("Rider ICR") than rate base assets in Docket Nos. 09-0166/0-0167 Cons. (Order, Docket Nos. 09-0166/09-0167 Cons., January 21, 2010, pp. 107-108 and 128.) Similarly, in Docket Nos. 08-0619/08-0620/08-0621 Cons., the Commission expressly authorized a lower rate of return for the Ameren utilities' PORCB assets than rate base assets. (Order, Docket Nos. 08-0619/08-0620/08-0621 Cons., August 19, 2009, pp. 32-22.) Therefore, the Company's reference to Rider AMP as precedent for the appropriate rate of return on Rider assets should be rejected because (1) the Commission explicitly stated that its approval of that Rider for the AMP pilot program is not precedent; and (2) the Commission has recognized that Rider recovery is less risky than rate base recovery in tariffs that are not pilot programs. (*See, generally*, Staff IB, pp. 82-83.)

In summary, the Company alleges "…Staff has introduced no credible evidence that investors would view the PORCB assets as less risky than ComEd's other capital investments, and therefore the PORCB investments should not be subject to a lower return." (Company IB, p. 34.) To the contrary, Staff analyzed the risk inherent in PORCB assets and used market data to estimate the current price for such risk. In contrast, ComEd admits that it did not analyze the risk associated with recovering the cost of PORCB assets through a rider with a true-up mechanism relative to the risk of cost recovery through tariffs established in a rate case. (Staff Ex. 4.0, pp 3-4, *citing* Company response to ICC Staff data request RP 1.10.) Yet, ComEd claims that

PORCB assets should receive the same rate of return as rate base assets. The Company's claim is baseless and should be rejected. For all of the foregoing reasons, the Commission should adopt Staff's rate of return recommendation for PORCB assets and the Commission should reject the Company's arguments opposing Staff's rate of return recommendation.

III. CONCLUSION

For the reasons set forth *supra*, Staff respectfully requests that the Commission's Final Order in the instant proceeding reflect Staff's recommendations regarding the Company's proposed PORCB Program and that the Company's proposed tariff changes be modified in accordance with Staff's recommendations.

Respectfully submitted,

/s/

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September 14, 2010

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